

D.T.E. 98-122

Petition and Request for Declaratory Relief of Massachusetts Electric Company concerning service by Peabody Municipal Light Plant to the Stop & Shop Company facility located at 19 Howley Street, Peabody, Massachusetts

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Limited Participant

I. INTRODUCTION AND PROCEDURAL HISTORY

On December 29, 1998, Massachusetts Electric Company (“MECo”) filed a Petition and a Request for Declaratory Relief (“Petition”) with the Department of Telecommunications and Energy (“Department”), concerning what it alleges to be the unauthorized distribution of electric service by the Peabody Municipal Light Plant (“PMLP”) to the Stop & Shop Company (“Stop & Shop”). On March 9, 1999, PMLP filed an Answer to the Petition (“Answer”).

At a procedural conference held at the Department’s offices on March 31, 1999, Cambridge Electric Light Company and Commonwealth Electric Company were permitted to intervene as Limited Participants. An evidentiary hearing was conducted at the Department’s Offices on October 13, 1999. John G. Upham, vice president of business services, and Paula Nicholson, senior paralegal, testified on behalf of MECo. Bruce P. Patten, general manager, testified on behalf of PMLP. The evidentiary record consists of eight exhibits. MECo and PMLP filed initial and reply briefs.

In 1995, Stop & Shop purchased an 11-acre property (“Property”) that straddles the municipal boundary separating the City of Salem, Massachusetts (“Salem”) from the City of Peabody, Massachusetts (“Peabody”) (Exh. DTE-2 at 3; Tr. at 21, 22; PMLP Brief at 2). Historically, the municipal boundary separating Salem from Peabody has served as the service territory boundary between MECo and PMLP (Tr. at 43). In 1998, Stop & Shop constructed a new supermarket (“Supermarket”) on the 11-acre site (Exh. DTE-1 at 1, 2; Tr. at 13-15). The Supermarket, like the Property, is also bisected by the municipal boundary (Exh. MECo-1,

Upham at 2; Exh. PMLP-3 at 2; Petition at 1-2; PMLP Brief at 2). The postal address of the Supermarket is 19 Howley Street, Peabody.

In early 1998, PMLP began providing temporary electric service to the Supermarket during its construction and entered into a nonresidential service agreement with it beginning on October 14, 1998 (Exh. MECo-2; PMLP Brief at 2). Under the service agreement, distribution service is supplied to the Supermarket by two major facilities. The first facility is an underground primary circuit owned by Stop & Shop. It runs from a PMLP owned and operated service line in Peabody to the second distribution facility, a padmounted transformer and meter installed, owned, and maintained by PMLP at the back of the Supermarket in Salem (Exh. DTE-2 at 4, 8; Exh. MECo-2; MECo Brief at 2; PMLP Brief at 3). The Supermarket opened for business on December 10, 1998 (DTE-3 at 1-1(b); PMLP Brief at 2).

II. POSITIONS OF THE PARTIES

A. MECo

MECo states that it and its predecessors have been the historic providers of distribution service to Salem since 1881 (Exh. MECo-1, Nicholson at 2-3; Petition at 1). According to MECo, about 90 percent of the Supermarket's structure is in Salem and 10 percent is in Peabody (Exh. MECo-1, Upham at 2). MECo further states that the Supermarket sits on a larger parcel of land that is approximately 40 percent in Salem and 60 percent in Peabody (id.).

MECo has never provided electricity or any other service to any portion of the Supermarket at 19 Howley Street, Peabody (Exh. DTE-3-2; Tr. at 28). Prior to the Supermarket's construction, MECo contends, previous facilities on the site were entirely within

Peabody's limits and, therefore, were served by PMLP (Exh. MECo-1, Upham at 4; MECo Brief at 2). MECo states that in order to provide service to the Supermarket, it would need to upgrade its distribution system along Main Street in Salem and also would need to obtain an easement through a parcel of land (Tr. at 40). MECo estimates the cost for this upgrade and easement would be approximately \$250,000 (id.).

MECo contends that it has the exclusive right to provide distribution service to customers in Salem, arguing that G.L. c. 164, § 1B(a) mandates that exclusive service territory boundaries are fixed solely by service territories actually served on July 1, 1997 (Exh. MECo-1, Nicholson at 2; Exh. DTE 3-5 (a); Petition at 3; MECo Brief at 4-5).¹ Because it served Salem on July 1, 1997, MECo argues that it has been granted the exclusive obligation to provide distribution service to retail customers in Salem pursuant to G.L. c. 164, § 1B(a) (Petition at 3). As such, MECo argues that the Department has no flexibility to adjust the service territory boundary (Exh. MECo-1, Nicholson at 2, 3; Exh. DTE 3-5(a); Petition at 1, 3, 4; MECo Brief at 4-5; MECo Reply Brief at 6).

MECo further contends that PMLP has exceeded the authority granted to it by G.L. c. 164, §§ 34 and 47 by extending its lines and mains outside of its service territory without receiving prior approval by the Department (Exh. MECo-1, Upham at 2;

¹ MECo contends that the language in G.L. c. 164, § 1B(a) requiring the Department to establish service territories "following to the extent possible municipal boundaries" refers only to situations where a municipality is being served by more than one distribution company, thereby making it impossible for the Department to strictly follow municipal boundaries to establish each service territory based on the geographical area of the municipality that each electric company actually served on July 1, 1997.

Exh. MECo-1, Nicholson at 3; MECo Brief at 1). Finally, MECo argues that permitting border customers to switch from a distribution company to a municipal light plant would improperly require the remaining distribution company customers to pay a greater portion of transition costs and other charges (MECo Brief at 7).

B. PMLP

PMLP claims that, since the 1890s, it has provided electric distribution service to customers located on the Property where the Supermarket is located and that MECo has never supplied electricity or any other service to the Property (Exh. DTE 1-1(c); Exh. DTE 2-1(c); Answer at 1). PMLP also contends that it has never supplied electricity or any other services to customers within MECo's service territory (Exh. DTE 1-3; Exh. DTE 2-3).

PMLP states that the Legislature intended to provide the Department with the flexibility to define service territories. PMLP argues that the phrase "following to the extent possible municipal boundaries" contained in G.L. c. 164, § 1B(a) allows the Department to consider an adjustment to a geographic service territory boundary in an appropriate circumstance such as "to further the best interests" of a customer situated astride a municipal boundary (Tr. at 72, 74-76; PMLP Brief at 4-5; PMLP Reply Brief at 3-4). As a customer owning a building located within two service territories, PMLP argues that Stop & Shop should be able to choose the electric company that best serves its interests (Exh. PMLP-3 at 4; Tr. at 45-46; PMLP Brief at 9). PMLP alleges that it is currently providing the Supermarket with quality electric service at better rates than MECo (Tr. at 47-48; PMLP Brief at 1-2, 5). For these reasons, PMLP

requests that the Department define the service territory boundary to place the Supermarket entirely within PMLP's service territory (PMLP Brief at 11).

PMLP further argues that it has the exclusive right to provide distribution service to the Supermarket because it has, for over 60 years, provided continuous service to the site upon which the Supermarket is located. PMLP states that Stop & Shop took over active electrical service from another PMLP customer, Larabee & Hingston, which was receiving service from PMLP on July 1, 1997 (Exh. PMLP-3 at 3; Exh. DTE 2-1(b); Tr. at 43, 48, 73, 79; PMLP Brief at 1, 5; PMLP Reply Brief at 3-4).

PMLP contends that it has not extended its lines outside of its service territory in violation G.L. c. 164, §§ 34 and 47, arguing that a reasonable interpretation of G.L. c. 164, § 1B(a) places the Supermarket entirely within PMLP's service territory (Tr. at 72; PMLP Brief at 3, 5; PMLP Reply Brief at 1).² In addition, PMLP argues that because Stop & Shop owns the underground distribution wires running from the interconnection at Howley Street to the padmount location in the rear of the Supermarket, PMLP has not extended its mains or lines beyond its service territory (PMLP Brief at 3).

III. ANALYSIS AND FINDINGS

By St. 1997, c. 164, § 193, inserting G.L. c. 164, § 1B(a), the General Court directed the Department to "define service territories for each [electric] distribution company . . . , based on the service territories actually served on July 1, 1997, and *following to the extent*

² PMLP testified that, historically, there were no poles, transformers or meters located on the Salem side of the site. Further, PMLP testified that while certain sheds located on the Salem side of the Property were served by PMLP, the wires were not owned by PMLP (Tr. at 68-69).

possible municipal boundaries [emphasis added].” By this explicit recognition of historically evolved, utility franchise patterns, the Legislature restated and reinforced existing law. The obligation of the Department is to give practical meaning and force to this codification and mandate by enforcing franchises as they existed on July 1, 1997. G.L. c. 164, § 1B(a), further provides that a distribution company, whose territory is so defined by statute and Department action, has “the exclusive obligation to provide distribution service to all retail customers within its service territory, and no other person shall provide distribution service within such service territory without the written consent of such distribution company and the clerk of the municipality so affected.” In the current dispute, PMLP has not presented evidence of the written consent of either MECo or the Salem City Clerk; and so the PMLP-MECo dispute over service to the Supermarket and the Property is properly before the Department for resolution.

Two questions need answers. First, what is the import for the instant dispute of the italicized clause in the statute cited in the preceding paragraph: that is, how much discretion does the statute give the Department in defining service territories; and is this a case for the exercise of that discretion? Second, do the intended actions of PMLP amount to “provid[ing] distribution service within [MECo’s] service territory”?

First, the General Court was aware in 1997 of the patchwork quilt of service territories of the seven investor-owned electric companies and forty municipal electric boards, which had developed over a century throughout the Commonwealth. The public interest in resolving franchise boundary disputes has been a matter of occasional public dispute since the earliest decades of the electric industry. See e.g., Weld v. Board of Gas and Electric Light

Commissioners, 197 Mass. 556, 559-60 (1908) (resolving a franchise boundary dispute that arose in 1902). Indeed, the very passage of St. 1997, c. 164, § 193, evidences awareness of this potential for dispute and the consequent need to regularize boundaries statewide. The legislative mandate to the Department was, as a result of this awareness, couched in terms that accorded the agency a measure of discretion in resolving disputes where the boundaries between service territories implicated municipal boundaries. The statute clearly envisions circumstances where cleanly following municipal boundaries may not be possible without giving rise to anomalies. MECo's interpretation of § 1B(a) is strained and constraining.³ The statute's wording is much more general than MECo asserts; and the statute recognizes and provides for the administrative resolution of complex factual disputes that statutory law cannot resolve in advance and in detail. Hence, it follows that the Department has discretion to depart from municipal boundaries in resolving service territory disputes, *if* facts and fairness so warrant.

As to the facts, the Supermarket's situation is not unique. Similar situations have arisen before and doubtless will again.⁴ For example, during the mid-1990s, a dispute arose over the right to serve Suffolk Downs racecourse which straddled the Revere-East Boston line and thus lay partially in MECo's and Boston Edison Company's service territories. See Boston Edison Company, EC 95-6 (1995). In disputes like these, one or the other utility will prevail; and the

³ See n.1, above.

⁴ The Department's most recent service territory disputes, MECo v. Braintree Municipal Light Department, D.P.U./D.T.E. 97-84 and Design/Housing Inc., D.T.E. 01-23 have been settled and the complaints before the Department withdrawn.

prevailing utility may perhaps then serve customer premises that lie partly in the municipality that the losing utility otherwise generally serves. We believe that a fair resolution may be had here by focusing on the customer, rather than the combatant utilities.

Where the customer's premises are an uninterrupted parcel owned in fee or leased by the customer, where those premises straddle a municipal boundary and thus straddle the presumptive line between two electric distribution companies, and, of particular importance, where there is no evidence that the customer engaged in land conveyance or lot merger to get around or defeat the central intent of G.L. c. 164, § 1B(a), we see no reason to deny the customer his choice of provider.⁵ Utility law is not zoning law, but some useful analogies can be drawn from that field of land use law—specifically from cases that attempt to allow efficient use by the owner of a lot that lies in adjacent municipalities. See e.g., Lapenas v. Zoning Board of Appeals of Brockton, 352 Mass. 530 (1967); Duhaime v. Planning Board of Medway, 12 Mass.App.Ct. 907 (1981). The analogy can be pressed too far, of course; but the point is to adjudicate the matter in a way that permits the customer to choose, where the statute does not offer a decisive answer. General Laws c. 164, § 1B(a), accords the Department sufficient discretion to permit PMLP to serve the Supermarket from property lying within

⁵ MECo argues that allowing border customers to switch distribution companies is improper as it would leave the rest of that company's customers responsible for paying a greater portion of the transition costs (MECo Brief at 7). MECo's argument might have merit in a situation where existing customers seek to switch service providers or when a new customer of record takes possession of an existing structure with pre-existing lines and where the structure has a history of service from a particular provider. These situations are not at issue on the facts of record. We note the question but need not rule on it now.

Peabody, despite the fact that some portion (here, even the majority) of the property lies in the adjacent municipality, Salem.⁶

The answer to the second question (i.e., whether PMLP's provision of service to the Supermarket even amounts to offering service in MECo's service territory) leads to the same outcome. Does the proposed service arrangement cross a service territory boundary? When looked at properly, we think the arrangement does not. Despite its incorporeal nature, electricity has long been regarded as the subject of sale. G.E. Lothrop Theatres Company v. Edison Electric Illuminating Company of Boston, 290 Mass. 189, 193 (1935). Resale of electricity by a customer apart, Boston Real Estate Board v. Department of Public Utilities, 334 Mass. 477 Mass. 484-85 (1956), once electricity is delivered (i.e., been sold) to a customer, it is his lawfully to use as he wishes on his metered premises. Once ownership of delivered electricity passes from PMLP to the intended customer, the Supermarket, it would be the customer's to do with as he wishes. Here, the customer premises (i.e., the Property) would be entered from a point in Peabody; and the electricity metered and sold would then be distributed exclusively by the customer for his own use within the customer's own premises. It really becomes a question of how the customer chooses to use his property, i.e., the electricity purchased, on the Property.

As to the location of PMLP-installed plant (i.e., the padmount transformer) on the Salem part of the Supermarket's parcel, we note that it is by no means an uncommon practice for a

⁶ Using a scale drawing provided by PMLP, the Department estimates that about 75 percent of the Supermarket is located in Salem and about 25 percent is located in Peabody. See Exh. PMLP-2.

utility to site plant outside its service territory to serve customers within its service territory. In terms of PMLP's authority to construct and maintain electric plant outside of Peabody, G.L. c. 164, § 34 authorizes a town to "construct, purchase or lease, and maintain within its limits, one or more plants for the manufacture or distribution of gas or electricity. . . ." Plant may include "structures and machinery and other apparatus and appliances" for distributing electricity. G.L. c. 164, § 34. Electric distribution facilities, such as the padmounted transformer and meter owned and operated by PMLP on the Property, are included in the statute's description of plant.⁷ Under G.L. c. 164, § 47, the Department may authorize a municipal lighting plant to extend its mains or lines into an adjoining town in order to distribute and sell gas or electricity beyond its municipal boundaries, if the adjoining town is not already being served by another municipal or private distribution company.

Had PMLP properly petitioned the Department, as it should have, for authority to extend its lines into the adjoining city of Salem, this matter may have been resolved in a much more expeditious manner. However, here we have a customer astride the municipal and service territory boundaries. If, as we conclude, the customer may, on this set of facts, fairly choose who will serve him, he should be able to consult his own convenience—electric code, local zoning code, and assent of his chosen provider permitting—as to where on his own parcel the necessary electric service equipment is to be placed, even if the customer's preferred placement is, as a formal matter, on the part of the parcel that lies in the nominal service

⁷ The underground distribution wires which run from the interconnection in Peabody to the padmount location at the rear of the Store in Salem are owned and maintained by the Supermarket, Stop & Shop. The transformer and meter located in Salem are owned by PMLP (Tr. at 71).

territory of the electric utility he has *not* chosen as his provider. Such placement may not, however, serve as a wedge for encroachment by the load-serving utility upon the neighboring utility's service territory.

We strongly caution, however, on one point. This Order should not be read as an invitation to reconfigure or manipulate lot or parcel boundaries ("creative conveyancing," so to speak)⁸ or to engage in other stratagems, in order artificially to defeat the principal purpose of § 1B(a), *viz.*, to conform electric distribution service territory boundaries, as these boundaries existed on July 1, 1997, to municipal boundaries and to do so "to the extent possible."

Petitions that result from such stratagems will not likely be successful. Petitions based on lot or parcel boundaries, which have been reconfigured since July 1, 1997 to bring part and, arguably, therefore effectively all of a customer's premises into a different service territory, will labor under a considerable burden to show that allowing the petition does not thwart Legislative intent.

⁸ See e.g., Ecological Fibers, Inc., D.P.U. 85-71 (1985). This Department Order predates G.L. c. 164, § 1B(a), which clearly states Legislative policy.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: that Massachusetts Electric Company's Petition and Request for Declaratory Relief concerning service by Peabody Municipal Light Plant to the Stop & Shop Company facility located at 19 Howley Street, Peabody, is DENIED; and it is

FURTHER ORDERED: That Peabody Municipal Light Plant may continue serve the Stop & Shop Company at 19 Howley Street, Peabody.

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).